APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1968 & 92-2295

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 2624—John F. Grady, *Judge*

No. 92-2923

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 92 C 1810—Paul E. Plunkett, *Judge*

ARGUED JANUARY 19, 1993—DECIDED AUGUST 9, 1993

Before BAUER, *Chief Judge*, and COFFEY and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. During the fall of 1983 United States Bedding Company and The Englander Company filed petitions in bankruptcy. Both firms had been making contributions to multiemployer pension plans; they completely withdrew from these plans in January 1984. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) permits an underfunded multiemployer pension plan to pursue a withdrawing employer for a portion of the plan's deficit. 29 U.S.C. § 1381. The plans assessed withdrawal liability aggregating $672,000. Despite some success in marshaling assets in bankruptcy, *In re United States Bedding Co.*, 52 B.R. 875 (Bankr. C.D. Cal. 1985), the employers have not satisfied any portion of their withdrawal liability.

The MPPAA provides that all members of a group under "common control" are liable for each other's withdrawal liability. 29 U.S.C. § 1301(b)(1). Both of the withdrawing firms were part of a corporate group under the umbrella of Van Vorst Industries, Incorporated. Van Vorst itself was a dry well, as were other corporate members of its family. The two pension funds believe that Navco, a partnership, also belonged to the Van Vorst group. Both funds filed suit against Navco and William L. Caldwell, its general partner (collectively Navco). Navco has invoked the statute of limitations in 29 U.S.C. § 1451(f):

> An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or

> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

Van Vorst and its affiliates withdrew early in 1984, yet one fund did not commence suit until 1991, and the other waited until 1992. Both suits came substantially more than six years after the withdrawals.

The suit by the Central States, Southeast and Southwest Areas Pension Fund (the Teamsters Fund) was assigned to Judge Grady. The pertinent dates are these. The employers finally withdrew by January 1984. On November 3, 1983, and again on March 14, 1984, the Teamsters Fund sent letters demanding that the employers identify other members of their corporate groups. See 29 U.S.C. § 1399(a). No replies were forthcoming. On April 6, 1984, the Teamsters Fund sent a formal notice of withdrawal liability and a demand for payment. The employers were supposed to pay immediately but had 60 days to "cure" any nonpayment. 29 U.S.C. § 1399(c)(2). That time expired on June 5, 1984. The Teamsters Fund filed its suit against Navco and Caldwell on May 1, 1991. Caldwell had been listed in the bankruptcy schedules as an equity investor in the employers. The Teamsters Fund claims that it did not discover Navco's existence until sometime during 1990; the Fund does not explain how Navco came to its attention. Judge Grady granted summary judgment for the defendants. He held that the suit is untimely under § 1451(f) because the claim accrued on June 5, 1984, when payment became delinquent, rather than when the Teamsters Fund discovered Navco's existence.

The suit by the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund

(the Independent Fund) was assigned to Judge Plunkett. The sequence is slightly different. The Independent Fund sent the employers a notice and demand on June 19, 1984, specifying a schedule of payments. The first payment was due on July 1, 1984, and additional payments were to be made each quarter through July 1, 1986. Not a cent was remitted in 1984 or at any later time. On August 28, 1990, the Independent Fund sent a letter to an attorney who had filed an appearance for U.S. Bedding in the bankruptcy action, asking for copies of the schedules filed in that case, a list of all equity investors in the firm, and "any information which indicates that these equity security holders owned any other corporation, partnership or sole proprietorship." No reply was forthcoming. The Independent Fund filed suit on March 13, 1992. It has not explained when or how it learned of Navco's existence. Like Judge Grady, Judge Plunkett granted summary judgment for the defendants. 800 F. Supp. 587 (N.D. Ill. 1992). Judge Plunkett concluded that the claim accrued on July 1, 1984, when the first payment was due, rather than quarterly as additional payments came due. The Independent Fund argued (as the Teamsters Fund had not) that the employers' failure to provide information about the control group tolled the statute of limitations. Judge Plunkett rejected this argument because, he held, the time limit established in § 1451(f) is a "jurisdictional" bar that may not be extended.

We have consolidated the pension plans' appeals from these decisions. Although we expressed concern at oral argument about appellate jurisdiction in the Independent Fund's case, study of the record has dispelled our worries. All claims against the four original defendants (Van Vorst and Elgea I, Inc., in addition to Navco and Caldwell) have been wrapped up (Van Vorst for lack of service, Elgea by default judgment), making the disposition final and appealable under 28 U.S.C. § 1291. By and large,

we treat the appeals as if there were only one employer and one fund making a single argument. We consider all of the arguments both funds present; details about which pension plan presented which argument are unimportant.

Both district judges concluded that the "cause of action arose" for purposes of § 1451(f) when the employers' debts to the pension plan became overdue, see *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir. 1989), rather than when they discovered the identity of persons who might be required to satisfy those debts. As soon as the 60-day grace period provided by § 1399(c)(2) expired, the funds could have commenced suit. They had been injured. That is the standard definition of the "accrual" of a claim.

Section 1451(f)(2) states a "discovery" rule, and a claim accrues under a discovery rule when the victim knows of his injury. The time begins even though the victim does not know that the injury is actionable. E.g., *United States v. Kubrick*, 444 U.S. 111, 119-22 (1979); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter. Consider negligent medical treatment, the subject of *Kubrick*. The Court held that the patient's claim accrued when he learned that he had been injured by a drug administered to him, even though he did not know that the use of this drug was negligent. Under the circumstances, the victim's observation that he did not know which physician had prescribed or administered the drug could not have mattered. Or consider an accident in a state that permits actions directly against an insurer. Driver *D* runs down pedestrian *P*, who believes *D* destitute. Does *P*'s neglect to learn the identity of *D*'s insurer extend indefinitely the

time to commence an action against that insurer? Finally consider what is perhaps the closest analogy: a shell corporation *C*, operated by shareholder *S* without observing the corporate forms, defrauds victim *V*. Correctly believing that *C* is insolvent, *V* does not explore the possibility of piercing the corporate veil. Does *V*'s neglect extend the time to make a claim against *S*? We could not find any case so holding. Plenty of cases reject contentions that particular claims do not accrue until the victim finds out who can be obliged to pay. E.g., *Lundblad v. Celeste*, 874 F.2d 1097, 1104 (6th Cir. 1989), modified on other grounds, 924 F.2d 627 (1991) (in banc); *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984); *McDaniel v. Johns-Manville Sales Corp.*, 542 F. Supp. 716, 718 (N.D. Ill. 1982). Only one case, *Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977), looks in the opposite direction, and that opinion relies on the doctrine of equitable tolling, a subject distinct from the time the claim accrues. We discuss equitable tolling below.

Six years from the time of the injury, which § 1451 (f)(1) affords as the minimum in every case, is generous. Congress appreciated that it might be difficult to ascertain the existence of a claim and track down persons liable under the Employee Retirement Income Security Act, a complex statute. (The MPPAA is an amendment to ERISA; § 1451 applies to all of ERISA.) Pension funds and other persons holding claims under ERISA can use that six years to investigate. And if the potentially liable person engages in fraud or concealment, then § 1451 (f)(2) affords six years from the discovery of the injury. The pension funds in our case, however, see the six years as a period of rest and recuperation. Only after knowing that they have not been paid, and recognizing who is liable, does the six years even start, the funds say. Yet if the time does not begin until the fund knows *everything* it needs to know—the existence of the debt, nonpayment, and the identity (and relation to the employer) of control

group members—why is the period so long? Statutes of limitations provide time within which a person who knows of an injury may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable. After completing the investigation, a pension fund should be able to make a demand (and, if necessary, file suit) in a matter of weeks. Allowing six years is understandable only on the assumption that the time was to be used to search for vital information. Both pension funds had ample time to explore questions about the Van Vorst corporate structure. They chose not to investigate and may not now insist that their own diffidence meant that the time did not even commence.

Any other approach would make the statute of limitations illusory. For it is not enough to know that a person slinks about in the background. Caldwell, after all, was identified in the bankruptcy filings as an investor, and the pension funds say that this was meaningless. In order to show that a person is liable as an "employer" by being involved in a control group, the funds must establish that the person actually controlled the trade or business in which the withdrawing firm was engaged. This can be a difficult task, as many recent cases in this circuit show. *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993); *Central States Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992); *Central States Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992); *Central States Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992); *Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992). The implication of the pension funds' argument is that the time would not even commence until all ancillary questions about the scope of control and the nature of the business have been resolved. Doing the research on these questions is what the six years are for, and we therefore hold that the claim accrues as soon as payment becomes overdue.

What, then, of the possibility that payment can become overdue frequently? The Independent Fund set a quar-

terly schedule, and the last payment was not due until July 1, 1986. The Independent Fund filed suit within six years of that date. Judge Plunkett concluded that a pension fund's power to accelerate future installments once the employer misses a payment, 29 U.S.C. § 1399(c)(5); 29 C.F.R. § 2644.4, means that the whole sum becomes due, and the whole claim accrues, when the first payment is missed. This is the right conclusion, but we put it somewhat differently. The pension fund had only one *claim* against the employer (and, derivatively, against the controlling persons): the amount of withdrawal liability. Although a fund may permit an employer to amortize this sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset. Section 1391 calls on the pension plan to determine an amount that is owed; the financing options under § 1399(c) do not break this single debt into little pieces with their own statutes of limitations.

Suppose a pension fund, dissatisfied with our conclusion that it has "only" six years to track down members of control groups, decides to grant itself additional time. If each overdue payment starts a new six-year period, the pension fund could *decelerate* payment on default—say, converting from a two-year schedule (which the Independent Fund selected) to a twenty-year schedule. Extra time cannot harm the fund, given that an insolvent employer will not pay on any schedule. Then once it locates what it believes is a member of the control group, the fund may demand payment of the current installment and, when this is not forthcoming, accelerate all future payments under § 1399(c)(5) and file suit. Clever, but it ought not work. Turning six years into twenty-six is a job best left to magicians. Statutes of limitations serve vital social interests—the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MPPAA the unusual one of protecting the

beneficiaries of the fund. Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment "[a]s soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. § 1399(b)(1).

The trustees' obligation to act with dispatch distinguishes debts under ERISA from ordinary contractual debts, in which the debtor and creditor may agree on their own schedule—and in which, therefore, courts often say that there is no duty to accelerate and that each unpaid installment is a new claim. E.g., *Frenzel v. Frenzel*, 260 Iowa 1076, 152 N.E.2d 157 (1967); *Light v. Light*, 12 Ill. 2d 502, 147 N.E.2d 34 (1957). See Arthur Linton Corbin, 4 *Contracts* § 951 (1951). The schedule under § 1399(c), by contrast, is *not* contractual; the employer did *not* assent to a longer period for payment and suit. We have not seen any case extending the contractual approach to the MPPAA, and like the district court we believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

Thus the six years began in 1984 and expired before either pension plan filed suit. The potential difference between § 1451(f)(1) and (2) need not detain us, because each pension plan "discovered" the nonpayment immediately. Even the proviso to § 1451(f)(2), awarding six years from discovery in the event of fraud or concealment, would not add a day to the six years available under § 1451(f)(1). (Correspondingly, we need not consider whether the control group's failure to stand up and identify itself is "concealment" for purposes of § 1451(f)(2).) Only the application of a tolling rule could enable either pension plan to recover.

Judge Plunkett concluded that tolling is unavailable because the time limit is "jurisdictional." He understood *Smith v. Chicago Heights*, 951 F.2d 834, 838 (7th Cir.

1992), to establish the principle that statutes of limitations applicable to claims "unknown to the common law" are jurisdictional and hence not subject to tolling or estoppel. The portion of *Smith* that contains this discussion dealt with Illinois law. There is no comparable rule when a federal statute supplies the period of limitations. To the contrary, periods of limitations in federal statutes—almost all of which establish rights "unknown to the common law"—are universally regarded as nonjurisdictional. E.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982) (period for filing charges under Title VII of the Civil Rights Act of 1964 is subject to waiver and tolling). Only rules limiting the commencement of actions against the United States itself have been given the jurisdictional" treatment, on account of sovereign immunity rather than some principle distinguishing statutory from common law rights. Even the doctrine protecting the national government from tolling a period of limitations crumbled recently. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). We hold accordingly that § 1451(f) does not curtail the jurisdiction of the federal courts.

It does not necessarily follow that doctrines of tolling and estoppel are fully applicable. Principles of tolling and estoppel apply to most federal statutes of limitations but not all, as *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991), shows. Sometimes Congress sets an outer bound on the time to commence an action, a statute of repose to compliment the period of limitations. *Lampf* holds that § 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e), establishes an unyielding three-year limit on the commencement of suits. Section 9(e) reads: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." The Court was im-

pressed by the dual periods: one running from discovery, and a longer period, serving as an outer limit, from the violation. The Court concluded that the "equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure." 111 S. Ct. at 2782. See also *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1391-92 (9th Cir. 1990) (§ 13 of Securities Act of 1933, 15 U.S.C. § 77m, is not subject to tolling or estoppel). Section 1451(f) likewise establishes a split period: three years from discovery (§ 1451(f)(2)) and six years from the actual injury (§ 1451(f)(1)). There is even a proviso to § 1451(f)(2) adding three years for fraud or concealment. Provision in the statute for a defined extra time for fraud or concealment makes it problematic for judges to use acts of the sort to which these pension funds point —silence in response to inquiries, a mild form of "concealment"—as a reason to grant time *beyond* six years. Unlike § 9(e) of the Exchange Act, however, § 1451(f) of ERISA does not specify a maximum time measured from the violation, so perhaps there is room for some tolling doctrines. But we must be careful not to use tolling principles to contradict the legislative decision that fraud and concealment justify six years from discovery, not more.

Today's case is not an occasion to determine the limits to equitable extensions under ERISA. Federal law contains two kinds of time-extending principles: equitable estoppel and equitable tolling. Equitable estoppel "denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time." *Cada*, 920 F.2d at 451. *Cada* gave as an example a promise not to plead the statute of limitations. Navco and Caldwell did not attempt to deceive the pension funds or induce them to defer suing. Equitable tolling, the other doctrine, "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain

vital information bearing on the existence of his claim." *Ibid.* This doctrine is potentially important in control group cases, because sometimes even six years will not be long enough to round up every last member. But equitable tolling hardly helps the pension funds, which were not "diligent" even by the standards of the Soviet Union. (Where labor's motto was: "We pretend to work, and they pretend to pay us.")

The Teamsters Fund sent letters in November 1983 and March 1984, after which it fell silent. The Independent Fund did not inquire until August 1990—when by our reckoning the six years had expired. Then it asked for schedules filed in the bankruptcy case, plus any other information the attorney cared to provide. Relying on a lawyer whose client had ceased to exist (U.S. Bedding's bankruptcy had been converted to a Chapter 7 liquidation and a trustee appointed) is problematic. The Independent Fund itself may have had the files in the bankruptcy case, or readily could have obtained them from the court; it was one of the firms' largest creditors. From these files the Independent Fund could have learned about Caldwell and asked him some questions. Either fund could have consulted Dun & Bradstreet or an equivalent service to find out what was publicly known about the firms' sources of capital. Either fund could have learned about Van Vorst's corporate structure by consulting the filings in that firm's bankruptcy, ongoing since November 1983. Reasonably diligent entities claiming that they are owed two thirds of a million dollars do that and more.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

February 14, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 2624

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs,

v.

VAN VORST INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Defendants William M. Caldwell, III and Navco ("defendants") have moved to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the foregoing reasons, the court grants defendants' motion.

FACTS

United States Bedding Company and The Englander Company were required to make contributions to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). Those companies, along with Van Vorst Corporation, Southern Cross Industries, Van Vorst Industries, Inc., Navco, and Elgea I, Inc., (collectively, "Van Vorst Controlled Group" or "Group") are treated as a single employer for withdrawal liability purposes. The Van Vorst Controlled Group completely withdrew

from the Fund and, as a result, Group members incurred joint and several liability in the amount of $619,453.71. On or about November 3, 1983, plaintiffs sent a Statement of Business Affairs to the Group, pursuant to 29 U.S.C. § 1399(a), in which they requested answers to liability questions. On or about March 14, 1984, plaintiffs sent another Statement of Business Affairs to the Group. The defendants did not answer and return either of these statements. On or about April 6, 1984, the Fund issued a Notice and Demand for Payment of Withdrawal to the Group. The Fund has not received any payment. Plaintiffs filed this complaint against Van Vorst Industries, Inc., Elgea I, Inc., Navco and William L. Caldwell, III on May 1, 1991, pursuant to 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1). Defendants have moved to dismiss on the ground that the complaint was not brought within the applicable statute of limitations in 29 U.S.C. § 1451(f).

DISCUSSION

In considering a motion to dismiss, a court must accept the facts alleged in the plaintiff's complaint as true and must draw reasonable inferences from the pleadings in plaintiff's favor. *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is appropriate " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Kunik v. Racine County, Wisconsin*, 945 F.2d 1574, 1579 (7th Cir. 1991) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Section 1451(f) provides that

> [a]n action under this section may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud

> or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f). The key issue here is when plaintiffs discovered their cause of action. Defendants argue that plaintiffs discovered the cause of action by June 1984, when defendants did not meet plaintiff's demand for payment, and that the complaint had to be filed—at the latest—by June 1990. Memorandum in Support of Motion of Defendants Navco and William Caldwell to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, at 3-6. Plaintiffs respond that they did not discover the cause of action until 1990 when they knew that they had a claim against Navco and Caldwell, and that they filed the complaint in 1991, well within either provision of the 1451(f)(2) time bar. Plaintiffs' Brief in Response to Motion to Dismiss of Defendants, William Caldwell, III and Navco, at 7-10 ("Plaintiffs' Brief").

The "discovery rule" of federal common law has been described in the following manner:

> Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date —often the same, but sometimes later—on which the plaintiff discovers that he has been injured.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). This discovery rule has been codified in the ERISA statute. An action may be brought no later than three to six years after plaintiffs have discovered their cause of action or injury.

According to the D.C. Circuit, under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461, "failure to meet the [plan sponsor's] demand [for payment] gives rise to the injury which the suit is designed to redress (and thus

to a 'cause of action')." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). The court agrees with this interpretation of the MPPAA. Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984. *See* 29 U.S.C. § 1399(c)(2) (payment due within 60 days after demand). Plaintiffs should have filed this complaint by 1987, or, at the latest, by 1990.[1] To interpret the statute otherwise, would give plaintiffs limitless time to file a complaint against defendants, thus vitiating the clear purpose of providing a specific time limitation in the Act itself.

Plaintiffs argue that the statute of limitations should be interpreted liberally to give them time to discover who injured them, pointing out that courts have recognized that pension funds often lack knowledge of controlled group relationships. This recognition, plaintiffs argue, is evidenced by the holding that notice of liability to one controlled group member constitutes notice to all control group members. Plaintiffs' Brief, at 10 n.10; *see IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118, 128 (3rd Cir. 1986). But it can be argued that this notice rule should alert pension funds to the possible difficulty of discerning the identities of the different controlled group members. When plaintiffs were aware that they had not been paid, they should have investigated and sued, within the statute of limitations period, those group members of which they were aware.

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[1] The court does not reach the issue of which ERISA statute of limitations provision applies, because it is not necessary to do so in this case.

Plaintiffs did not raise the issues of equitable tolling or equitable estoppel. In any event, the MPPAA statute of limitations may be jurisdictional and thus not subject to equitable tolling and estoppel. *See Smith v. City of Chicago Heights*, No. 90-2976, slip op. at 6-7 (7th Cir. Jan. 13, 1992).

Once the suit had been instituted, discovery could have been conducted to determine the identities of the other members in time to join them within the limitations period.

CONCLUSION

For the foregoing reasons, the court grants the motion of defendants William L. Caldwell, III and Navco to dismiss this cause as barred by limitations. The dismissal will be with prejudice.

DATED: February 14, 1992

ENTER:

/s/ John F. Grady
United States District Judge

APPENDIX C

March 27, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 2624

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs,

v.

VAN VORST INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs have moved to alter or amend the court's judgment of February 14, 1992, in favor of defendants William L. Caldwell, III, and Navco. For the reasons stated below, plaintiffs' motion is denied.

FACTS

United States Bedding Company and The Englander Company were required to make contributions to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). Those companies, along with Van Vorst Corporation, Southern Cross Industries, Van Vorst Industries, Inc., Navco,[1] and Elgea I, Inc., (collectively, "Van Vorst Controlled Group" or "Group") are treated as a single employer for withdrawal liability purposes. The Van Vorst Controlled Group completely withdrew

[1] William L. Caldwell, III was the general partner of Navco.

from the Fund and, as a result, Group members incurred joint and several liability in the amount of $619,453.71. On or about November 3, 1983, plaintiffs sent a Statement of Business Affairs to the Group, pursuant to 29 U.S.C. § 1399(a), in which they requested answers to liability questions. On or about March 14, 1984, plaintiffs sent another Statement of Business Affairs to the Group. The defendants did not answer and return either of these statements. On or about April 6, 1984, the Fund issued a Notice and Demand for Payment of Withdrawal to the Group. The Fund has not received any payment. Plaintiffs filed this complaint against Van Vorst Industries, Inc., Elgea I, Inc., Navco and William L. Caldwell, III on May 1, 1991, pursuant to 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1). Defendants William L. Caldwell, III, and Navco ("defendants") moved to dismiss on the ground that the complaint was not brought within the applicable statute of limitations in 29 U.S.C. § 1451(f). The court granted defendants' motion. Plaintiffs now move to alter or amend the court's judgment.[2]

DISCUSSION

In its previous opinion, the court decided that plaintiffs had failed to sue defendants within the time period prescribed in 29 U.S.C. § 1451(f). That section provides that

> [a]n action under this section may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the

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[2] In plaintiffs' motion to alter or amend, plaintiffs state that "[n]oticeably omitted [from the facts] by the Court . . . is the important fact that U.S. Bedding and Englander filed for bankruptcy seeking Chapter 11 protection from their creditors and were subject to the jurisdiction of the Bankruptcy Court during all relevant periods of the underlying action." Brief in Support of Motion to Alter or Amend ("Plaintiffs' Brief"), at 3. Plaintiffs have not attempted to show how this fact is relevant to defendants' motion to dismiss on statute of limitations grounds.

> earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f). This court stated that

> [a]ccural is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date —often the same, but sometimes later—on which the plaintiff discovers that he has been injured.

Central States, Southeast and Southwest Areas Pension Fund v. Van Vorst Inds., Inc., No. 91 C 2624, slip op. at 3 (N.D. Ill. Feb. 14, 1992) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991)). This court held that

> "failure to meet the [plan sponsor's] demand [for payment gave] rise to the injury which the suit [was] designed to redress (and thus to a 'cause of action')." . . . Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984.

Van Vorst Inds., Inc., slip op. at 4 (quoting *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989)).

Plaintiffs argue that when a demand for payment has not been met a separate cause of action arises against each controlled group member when plaintiffs discover (or should have discovered) the member's identity. *See* Plaintiffs' Brief, at 7-8. Plaintiffs assert that *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied, Bren-*

nan v. Hobson, 470 U.S. 1084 (1985), and *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988), support their interpretation. Neither case is an ERISA case interpreting the statute of limitations applicable in this case. Further, the accrual rules in those cases appear to conflict with *Cada*'s rule that accrual occurs when the plaintiff discovers that he has been injured. In any event, it is possible that the rules in those cases are consistent with the rules applied in this case. In *Hobson*, the D.C. Circuit stated that "a plaintiff may [not] postpone suit until he knows every defendant by name and title," but the plaintiff must have been "on notice of all possible defendants, and not just a subgroup, as well as the particular cause of action." 737 F.2d at 36. The facts of this case are unlike the facts of *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), which *Hobson* cited as illustrative of this notice rule. In *Fitzgerald*, the plaintiff, a former Air Force employee who had sued Air Force officials for improper discharge, was allowed to bring a later action against a White House official because there was no reason he should have known of any White House involvement in his discharge. 553 F.2d at 229. Here, although plaintiffs argue that they did not know every defendant when demand for payment was not met, they were aware that a controlled group existed. *See* Plaintiffs' Brief, at 2 (plaintiffs sent Statements of Business Affairs to Group). In *Keystone*, the Third Circuit stated that "[i]t is generally the case that a claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of injury." 863 F.2d 1125, 1127 (3rd Cir. 1988). It is unclear from the context of that case, which involved RICO, whether the Third Circuit, in using the phrase "source of injury," meant defendant's identity or simply how the injury was caused.

Plaintiffs also assert that *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, No. 90-3546, slip op. (7th Cir. Feb. 24, 1992), supports their reading

of the limitations period. Plaintiffs' Brief, at 11-12. The court disagrees. In *Slotky*, after Stevens Bedding Warehouse, Inc. ("Stevens") withdrew from its pension plan, the plan mailed notice and demand for payment to Stevens. *Id.* at 2. Under the facts of the case, Burton Slotky was part of the controlled group liable for withdrawal. *See id.* at 2-8. The plan did not give notice and demand to Slotky. *See id.* at 2-3. According to §§ 1399(b)(2)(A) and 1401(a)(1), arbitration must be initiated within a prescribed time period from the time that notice and demand are made. *See id.* at 2. Slotky failed to initiate arbitration within that time period. *See id.* at 3. The Seventh Circuit stated that "notice to one member of a controlled group is notice to all" so that Slotky waived his arbitration rights when he did not initiate proceedings within the prescribed time period. *See id.* at 4, 8.

Slotky appears to support this Court's decision. Section 1399 refers to only one "notice and demand." *Slotky* holds that notice to one controlled group member is notice to all controlled group members. It follows that demand upon one member constitutes demand upon all members. And because the cause of action against a known group member arises after demand for payment has not been met, the cause of action against all group members arises at that same time. Moreover, because both the availability of arbitration and the accrual of the limitations period depend upon when "notice and demand" are made, and a controlled group member can only initiate arbitration within the same time period as other members, it is logical that the plan should only be able to bring suit against the member within the same time period as it can against other members. Furthermore, the court's interpretation of § 1451 is consistent with most statutes of limitations which arise upon the injury (or discovery of the injury) to the plaintiff, not upon the plaintiff's discovery of the defendant's identity. *See, e.g., Guebard v. Jabaay,* 381 N.E.2d 1164, 1167 (Ill. App.

1978), *appeal after remand*, 452 N.E.2d 751 (Ill. App. 1983).

Plaintiffs argue that the policy behind the notice rule favors their interpretation of the statute of limitations. Plaintiffs' Brief, at 11-12. The Seventh Circuit stated that "[t]here is nothing unreasonable about requiring the notified firm to notify the other members of the controlled group rather than requiring the pension plan to thread what may be a maze of intercorporate relations to establish the bounds of the group.'" *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, No. 90-3546, slip op. at 9 (7th Cir. Feb. 24, 1992). This court's interpretation of § 1451 does not require controlled group members to "thread what may be a maze." If plaintiffs wanted to enforce their right to receive information about the group members,[3] they could have come to court within the limitations period to enforce this right. *See Goldowitz & Gigot, The Controlled Group Rule for Purposes of Withdrawal Liability Provisions of the Employee Retirement Income Security Act*, 90 W. Vir. L. Rev. 773, 791-92 (1988).

Plaintiffs also argue that the court's interpretation of the statute effectively makes § 1451(f)(2) a nullity. Plaintiffs' Brief, at 4-6. But § 1451 applies to more than withdrawal liability. In *Clyde Sandoz Masonry*, the D.C. Circuit addressed the employer's argument that subsection (f)(2) would never be applicable if the limitations period began to run at the time an employer failed to pay after demand. The D.C. Circuit stated that

> the time bar applies to "[a]n action under this section." Section 1451, situated at the beginning of the

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[3] Section 1399(a) provides that "[a]n employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part." 29 U.S.C. § 1399(a).

> subtitle part entitled "enforcement," is hardly limited to the type of suit before us. Instead, section 1451 applies to suits brought by a wide variety of parties. Additionally, the section applies to recovery by a party "adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan." That subtitle, 29 U.S.C. §§ 1381-1453 (governing, among other things, employer withdrawals, transfers of plan assets, reorganizations of plans, and benefits after termination of plans), extends to matters far beyond collection of withdrawal liability. Like suits involving these other parties adversely affected in these other matters, even suits brought by plan sponsors seeking to claim withdrawal liability may perhaps independently rely upon the discovery prong of the time bar when "default" occurs for reasons other than the employer's failure to meet a sponsor's demand for payment.

Clyde Sandoz Masonry, 871 F.2d at 1125 (citations omitted).

Finally, plaintiffs argue that the court's interpretation of the limitations period does not give effect to the fact that controlled group members have joint and several liability. Plaintiffs state that a defendant who is jointly and severally liable cannot use a statute of limitations defense that is available to a co-defendant. Plaintiffs' Brief, at 9-10. The court agrees. However, that is simply not occurring here. Navco and William L. Caldwell III both have raised timely statute of limitations defenses, and no other parties have been (or will be) allowed to raise Navco and William L. Caldwell's defenses. Joint and several liability allows plaintiffs to recover the entire withdrawal liability amount from any controlled group member if the controlled group member is sued within the limitations period. The court's interpretation of § 1451 does not prevent this from occurring.

CONCLUSION

For the foregoing reasons, the court denies plaintiffs' motion to alter or amend.

DATED: March 27, 1992

ENTER: /s/ John F. Grady
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 20, 1993

Before HON. WILLIAM J. BAUER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge

Nos. 92-1968 & 92-2295

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 91 C 2624—John F. Grady, *Judge*

No. 92-2923

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 92 C 1810—Paul E. Plunkett, *Judge*

ORDER

Plaintiffs-Appellants filed petitions for rehearing and suggestions of rehearing en banc on September 7, 1993. No judge in regular active service has requested a vote on the suggestions of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The Teamsters Fund's argument that it was diligent in seeking control group members was not presented to the panel prior to decision, and is thus waived. The petitions for rehearing are therefore DENIED.

APPENDIX E

EXCERPT FROM BRIEF OF APPELLANTS CENTRAL STATES PENSION FUND, *ET AL.*, IN THE COURT BELOW

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II.

BOTH ERISA AND FEDERAL COMMON LAW PROVIDE RELIEF FROM THE OPERATION OF THE STATUTE OF LIMITATIONS IN THIS CASE.

Even if the district court were right that § 1451(f)(1) by itself would bar this action, it erroneously failed to apply the exceptions of § 1451(f)(2) that would have extended the statute of limitations.[7] ERISA's statute of limitations provision indicates that Congress recognized that employers may not always be readily identifiable or, indeed, may actively conceal their existence. Section 1451(f)(2) is the remedy for such a case, providing two extensions to the § 1451(f)(1) limitation. The first extends the period three years from the plan's acquiring "actual knowledge"; the second extends the period six years "in the case of fraud or concealment." 29 U.S.C. 1451(f)(2). On its face the provision applies to all MPPAA actions since it contains no limitations. Nonetheless the district court did not apply Section 1451(f)(2) because the court believed the "single employer" treatment accorded controlled group members rendered that section null (in a collection action but not other MPPAA actions). As illustrated at Argument I (supra),

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[7] Obviously to the extent that the applicability of § 1451(f)(2) turns on the Fund's lack of "actual knowledge" or the employer's "fraud or concealment", the Fund has pleaded those facts sufficiently to overcome the motion to dismiss.

this extension of the "single employer" doctrine to Section 1451(f) would defeat both of its paragraphs where either a lawsuit (or claim in bankruptcy is timely filed against any one member. Further, closer analysis of § 1451(f) reveals that paragraph (f)(2) works hand in hand with paragraph (f)(1) in any collection action. Indeed even in the absence of § 1451(f)(2) similar principles of equity would apply.

Section 1451(f)(2) seems to codify the two equitable doctrines that are otherwise grafted on to statutes of limitations: equitable tolling and equitable estoppel. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 110 S.Ct. 2916, 115 L.Ed. 2d 1079 (1991). Equitable tolling permits a plaintiff to avoid the statute of limitations if, despite due diligence, it is unable to obtain information bearing on the existence of the claim. *Id.* Equitable tolling therefore finds itself codified in the "actual knowledge" portion of § 1451(f)(2): the plaintiff knows of the injury, but is unable to obtain information to decide whether the injury is due to the wrongdoing, or any action, of an unknown defendant. Equitable estoppel, on the other hand, speaks to the "fraud or concealment" provision of 1451(f)(2) and arises where the plaintiff is prevented from suing in time by some effort on the part of the defendant. *Id.* ERISA's codification of these equitable defenses, which would otherwise apply to the statute of limitations, is thus an integral part of the statute of limitations and must apply to any collection action arising under the statute. 29 U.S.C. § 1451(b); (f)(1) and (f)(2).

Even if Section 1451(f)(2) does not apply to the Pension Fund's cause of action against these defendants, general equitable principles still do. *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1376; *Cada*, 920 F.2d at 451. The Pension Fund undertook affirmative steps to establish its

cause of action by filing its claim in bankruptcy, which tolled the statute of limitations. *See Central Transport,* 888 F.2d at 1164; *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 875 F.2d 1285, 1294 (7th Cir. 1989), *cert. denied,* 493 U.S. 1003, 110 S.Ct. 563, 107 L.Ed. 558 (1989).

Moreover, in November, 1983 and March, 1984, Central States solicited information, which would have led to these defendants, from the employer and received no response. This is thus a case where the employer concealed these defendants' identities, and it is equitably estopped under federal common law from asserting the Pension Funds' claim is barred by the statute of limitation. The Van Vorst Controlled Group was required by § 1399(a) to comply with the Pension Fund's request for information. 29 U.S.C. § 1399(a). The controlled group's failure to comply with this request prevented the Pension Fund from initiating a claim against these defendants and constituted "fraudulent concealment," or equitable estoppel. *Cada,* 920 F.2d at 451; *Martin v. Consultants and Administrators,* slip op. at 25-28 and note 17; *see also Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir. 1978) (silence is concealment where there is a duty to disclose).

The district court ought to have denied the defendants' motion to dismiss on the grounds that the Pension Fund had sufficiently pleaded both equitable tolling and equitable estoppel. Even better the district court should have recognized that the two equitable devices for avoiding the statute of limitations have already been made applicable to this case by their codification at § 1451(f)(2). It makes no sense to reject § 1451(f)(2) only to in essence rediscover it in equity since a straight-forward application of ERISA's statute of limitations reaches the same result. Since the Pension Fund filed its cause of action within 6 years after the date of discovery of its cause of action against these defendants, after uncovering the

employer's fraud or concealment, therefore, the Pension Fund's cause of action is not barred by the statute of limitations, and the order of the district court dismissing the complaint under Rule 12(b)(6) must be reversed.

* * * *

APPENDIX F

EXCERPT FROM THE REPLY BRIEF OF CENTRAL STATES PENSION FUND, *ET AL.*, IN THE COURT BELOW

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B. *The Statute of Limitations Has Been Tolled in this Case.*

Even if Central States' cause of action against the defendants arose in 1984, the Pension Fund demonstrates in its opening brief that its action was timely filed under 29 U.S.C. 1451(f)(2). That section provides that an action may not be brought after—

> 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action."

29 U.S.C. 1451(f)(2). The Pension Fund alleged in its complaint that it acquired actual knowledge of this cause of action in 1990. Whether Central States should have acquired this knowledge earlier, starting the three-year limitations period before 1990, is a factual inquiry which was inappropriately decided on a motion to dismiss. Defendants did not and do not offer any evidence or even allege that the Pension Fund should have acquired actual knowledge of these defendants and this cause of action earlier.

* * * *